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No. 01-618

IN THE

Supreme Court of the United States

ERIC ELDRED, ET AL.,

Petitioners,

v.

JOHN D. ASHCROFT, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF JACK M. BALKIN, YOCHAI BENKLER, BURT NEUBORNE, AND JED RUBENFELD AS *AMICI CURIAE* IN SUPPORT OF THE PETITION

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STATEMENT OF INTEREST

With the written consent of the parties, reflected in letters on file with the Clerk, the undersigned law professors submit this brief as *amici curiae*, pursuant to Rule 37 of the Rules of this Court.

Amici are teachers and students of constitutional law and the First Amendment, who have studied its application to copyright. They are Jack M. Balkin, Knight Professor of Constitutional Law and the First Amendment, Yale Law School; Yochai Benkler, Professor of Law, New York University School of Law; Burt Neuborne, John Norton Pomeroy Professor of Law, New York University School of Law; and Jed Rubenfeld, Robert R. Slaughter Professor of Law, Yale Law School. They submit this brief *pro* se, representing no institution, group, or association. Their sole purpose is to offer what assistance they can to this Court as it considers whether to grant the petition for certiorari in this important case about the relationship between the First Amendment and copyright. In particular, this brief is filed to present to the Court an argument about the appropriate general framework for First Amendment review of substantial legislative changes in copyright law.

SUMMARY OF ARGUMENT

The Court of Appeals for the District of Columbia has taken the extraordinary step of categorically immunizing copyright legislation from first amendment review. "Copyrights," the court held, "are categorically immune from challenges under the First Amendment." *Eldred v. Reno*, 239 F.3d 372, 375 (D.C. Cir. 2001). "[W]e reject [plaintiffs'] first amendment objection to the CTEA *because the plaintiffs lack any cognizable first amendment*

right to exploit the copyrighted works of others." *Id.* at 376. (emphasis added)

If the appellate court's holding means what it says—that individuals have no "cognizable First Amendment interest in exploiting the works of others," *Id.*—then the fair use doctrine exists at congressional sufferance, a flat contradiction of this Court's ruling in *Harper & Row Publishers, Inc. v. Nation Enter.*, 471 U.S. 539 (1985). In *Harper & Row*, the Court expressly referred to fair use as one of the "First Amendment protections . . . embodied in the Copyright Act[.]" *Id.* at 560. Fair use could not be a "First Amendment protection" if individuals had no "cognizable First Amendment interest in exploiting the works of others."

The disposition below is consistent with such a categorical immunity. The Court of Appeals upheld the term extension law without any consideration of its tailoring to its purpose, or, indeed, its bare rationality. It did not consider even the retroactive application of the challenged statute—a provision unlikely to survive even a minimal requirement that it be rationally related, much less narrowly tailored, to the constitutional mandate of copyright legislation, to "supply the economic incentive to create and disseminate ideas." *Harper & Row*, 471 U.S. at 558.

But even if the Court of Appeals' decision can be interpreted more narrowly, to mean only that under *Harper & Row* the idea/expression dichotomy and fair use *exhaust* the limitations on copyright required by the First Amendment, that position is insupportable and conflicts with a recent decision by the Court of Appeals for the Second Circuit. In *Universal City Studios, Inc. v. Corely*, 2001 U.S. App. LEXIS 25330 (2d Cir. Nov. 28, 2001) the

court upheld Section 1201(a)(2) of the Copyright Act only after clearly and explicitly subjecting that provision to heightened first amendment scrutiny, *id.* at *62-63, following the standard set by this Court in *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 662 (1994) ("*Turner I*").

The correct interpretation of *Harper & Row*—recently expressed by the Court of Appeals for the Eleventh Circuit in *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001)— is that doctrines internal to copyright law usually prevent copyright from conflicting with the First Amendment. Any law—copyright included—that is implemented by telling anyone that there are some words or images that they may not print, publish, or display publicly raises a first amendment question. When that law is copyright law, the prohibition is normally permitted, and conflict with the First Amendment is generally avoided by safety valves internal to copyright law—like the idea/expression dichotomy, the fair use doctrine, or copyright law's placement of some materials in the public domain. In *Harper & Row* this Court held that these safety valves obviated the need for a *special* first amendment-based public figure exception to copyright. But if Congress passes a statute that undermines those safety valves—say, by eliminating fair use altogether or by passing a hypothetical law excluding fair use of works authored by Republican Senators—of course that statute would be subject to First Amendment review, and would almost certainly fail.

Copyright law is not a law aimed at conduct that incidentally affects speech. It is a law aimed at improving the marketplace in expression, which is implemented by suppressing some expression—perhaps derivative, perhaps imitative—so as to support other expression—original and

creative. But it is nonetheless a law that directly prohibits protected speech. Broadcasting portions of Dr. Martin Luther King's "I Have A Dream" speech in a documentary, *see* Estate of Martin Luther King Jr., Inc. v. CBS, Inc., 194 F.3d 1211 (1999), is no less valuable to the marketplace of ideas, or to the expressive freedom of the film maker, than is a mediocre—though original and non-infringing—song about puppy love. Yet copyright is often implemented precisely by prohibiting such public expression. As a law directly aimed at speech and operating by imposing selective prohibitions on communication, copyright law must be subject to heightened scrutiny.

The Court need not, however, consider whether the Sonny Bono Copyright Term Extension Act ("CTEA"), Pub. L. No. 105-298, 112 Stat. 2827 (1998) (codified at 17 U.S.C. § 304), is indeed invalid under the First Amendment. All the Court need do is remand with instruction for the court below to review the CTEA under the standard appropriate for laws specifically aimed at regulating expression in pursuit of legitimate state interests, which requires some degree of heightened scrutiny.

ARGUMENT

I. The Decision Below Misconstrues *Harper & Row* To Create A New And Unusually Expansive Immunity From Judicial Review For Copyright Legislation

The opinion of the court below is the most explicit of a number of circuit court decisions that have taken the unusual step of substantially immunizing an entire area of

congressional legislation from first amendment review.[1] "Copyrights," the court held, "are categorically immune from challenges under the First Amendment." *Eldred*, 239 F.3d at 375. The categorical nature of this exclusion is clearest in that court's conclusion of its analysis of the petitioners' first amendment challenge: "we reject their first amendment objection to the CTEA *because the plaintiffs lack any cognizable first amendment right to exploit the copyrighted works of others*." *Id.* at 376. (emphasis added)

This formulation places expression that uses copyrighted cultural materials in a shrinking group of categorically disfavored speech—like obscenity and fighting words. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992). Defamation was once such a category,

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[1] Other circuits have advocated a more limited version of this position, namely, that elements of the Copyright Act–fair use and/or the idea/expression dichotomy–exhaust First Amendment considerations in the field of copyright. The Ninth Circuit is one example. *See, e.g., A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1028 (9th Cir. 2001) ("We note that First Amendment concerns in copyright are allayed by the presence of the fair use doctrine."); *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1170 (9th Cir. 1977) (stating that "the idea-expression dichotomy . . .serves to accommodate the competing interests of copyright and the First Amendment"). Earlier decisions of the Second Circuit could be read to adopt a similar stance. *See, e.g., Nihon Keizai Shimbun, Inc. v. Comline Bus. Data, Inc.*, 166 F.3d 65, 74 (2d Cir. 1999) (stating that the Second Circuit has "repeatedly rejected First Amendment challenges to injunctions from copyright infringement on the ground that First Amendment concerns are protected by and coextensive with the fair use doctrine"); *New Era Publ'ns Int'l v. Henry Holt & Co.*, 873 F.2d 576, 584 (2d Cir. 1989) ("Our observation that the fair use doctrine encompasses claims of First Amendment in the copyright field, never has been repudiated.") (citations omitted); *Roy Export Co. v. CBS, Inc.*, 672 F.2d 1095, 1099 (2d Cir. 1982) ("No circuit that has considered the question...has ever held that the First Amendment provides a privilege in the copyright field distinct from the accommodation embodied in the "fair use" doctrine.").

see Beauharnais v. Illinois, 343 U.S. 250 (1952), but that categorical exclusion has been substantially limited since the 1960s. *See New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), *R.A.V* 505 U.S. at 382. Commercial speech was once such a category, *see Valentine v. Chrestensen*, 316 U.S. 52 (1942), but that categorical exclusion has largely been abandoned since the 1970s. *See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976); *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980).

Even within this shrinking group of categorical exclusions from the ambit of first amendment protection, statutes are not exempt from review simply through the act of categorizing them. Obscenity, though constitutionally unprotected, does not accord legislation purporting to regulate it such categorical immunity, for even with obscenity laws courts must assure that the law actually covers only obscene materials. *See Miller v. California*, 415 U.S. 15, 23-24 (1973) ("We acknowledge . . . the inherent dangers of undertaking to regulate any form of expression. State statutes designed to regulate obscene materials must be carefully limited. As a result, we . . . confine the permissible scope of such regulation to works which depict or describe sexual conduct."). Fighting words do not accord such status to laws purporting to regulate them, for the court must still see if the regulation of fighting words in fact regulates that which is "fighting" about them or that which is "words." *R.A.V.*, 505 U.S. at 385-6.

On its face, then, the decision below created a unique categorical First Amendment rule: it is sufficient to characterize a restraint as applying to works covered by copyright law to immunize that legislative restraint from

review. "The works to which the CTEA applies, and in which plaintiffs claim a first amendment interest, are by definition under copyright; that puts the works on the latter half of the 'idea/expression dichotomy' and makes them subject to fair use. This obviates further inquiry under the First Amendment." *Eldred*, 239 F.3d at 376.

The Court of Appeals based this unusual exception to First Amendment law on a misreading of this Court's precedent in *Harper & Row*. In particular, it based its exception on an unnecessarily broad and incorrect interpretation of this Court's statement that "Copyright's idea/expression dichotomy strikes a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author's expression." *Harper & Row*, 471 U.S. at 556.

In *Harper & Row*, the Nation Magazine asked the Court to create a special first amendment exception to copyright law for news reporting that used copyrighted materials. This the Court refused, concluding, "we see no warrant for expanding the doctrine of fair use to create what amounts to a public figure exception to copyright." *Harper &* Row, 471 U.S. at 560.[2] There was no need, the Court held, to create such a *special* first amendment exception to the scope of copyright law "[i]n view of the First Amendment protections already embodied in the Copyright Act's distinction between copyrightable expression and uncopyrightable facts and ideas, and the

[2] Elsewhere the Court characterized the argument it rejected in these terms: "The fact that the words the author has chosen to clothe his narrative may of themselves be 'newsworthy' is not an independent justification for unauthorized copying of the author's expression prior to publication." 471 U.S. at 557.

latitude for scholarship and comment traditionally afforded by fair use. . . ." *Id.*

The Court's holding was, therefore, exactly the inverse of the interpretation adopted below. Far from users having no "cognizable First Amendment right to exploit the copyrighted works of others," the Court treated specific doctrines of copyright law as "First Amendment protections."[3] No law could be a "First Amendment protection" unless someone who could claim its benefit has a cognizable first amendment interest in doing what the law permits. How could one say that Alice Randall, author of a book entitled *The Wind Done Gone*, has no first amendment interest in using elements of *Gone With the Wind* to tell her critical tale from a slave's perspective. *See Suntrust Bank*. *Gone With the Wind* defined the popular cultural perspective of the Old South in which Randall grew up as an African American woman. One can speak coherently about Randall's first amendment interest being outweighed, insofar as she used another's story elements, by the legislative purposes of copyright law. But it is incoherent to say that she has "no cognizable first amendment interest" in writing and publishing a book in which she uses that story line in a way that she believes will be politically significant and personally liberating. The very essence of the First Amendment is the "freedom to think as you will and to speak as you think," *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring). Certainly her interest in using the words she

[3] *Cf. Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 582-83 (1994) (evaluating eligibility of a potentially infringing work to be treated as a parody and a fair use by quoting with approval the statement that "First Amendment protections do not apply only to those who speak clearly, whose jokes are funny, and whose parodies succeed," quoting *Yankee Publishing Inc. v. News America Publishing, Inc.*, 809 F. Supp. 267, 280 (SDNY 1992) (Leval, J.)).

believes will best convey her views is no weaker than Paul Cohen's choice of locution to criticize the draft. *Cohen v. California*, 403 U.S. 15 (1971).

The implication of *Harper & Row* is that, far from copyright being immune to First Amendment review, legislation that would seek to change at least some elements of copyright law—those deemed to be first amendment protections—must be reviewed to see if the change excessively undermines those protections. At least those doctrines expressly identified by the Court—fair use and the idea/expression dichotomy—could not be repealed or substantially weakened without being subject to first amendment review.

Perhaps, however, the words used by the court below were mere hyperbole, and an interpretation of its opinion in terms less directly in conflict with this Court's precedents is available. Perhaps the court below merely held that since the CTEA left the fair use doctrine and the idea/expression dichotomy untouched, no First Amendment issue can be raised. Even on this sympathetic reading, at a minimum the Court below held that fair use and the idea/expression dichotomy *exhaust* the first amendment protections embodied in the copyright law. On this reading, the First Amendment has nothing to say regarding any other line along which the boundary between the public domain and the proprietary is drawn. But this is an implausible reading of the First Amendment. The public domain defines the set of expressions individuals can make use of free of the legal proscriptions Congress enacts in aid of the incentives of authors. Any legislation that substantially increases the set of circumstances under which law prohibits expressions previously permitted is legislation that must be carefully scrutinized.

There is no reason to think, then, that this Court's listing in *Harper & Row* of the two first amendment protections relevant to that case—fair use and the idea/expression dichotomy—was intended to exhaust all copyright doctrines that play such a role. As the Court of Appeals for the Eleventh Circuit in *Suntrust Bank* recently put it, "the balance between the First Amendment and copyright is preserved, *in part,* by the idea/expression dichotomy and the doctrine of fair use." 268 F3d at 1263 (emphasis added). Because of these protections, "courts *often* need not entertain related First Amendment arguments in a copyright case." *Id.* at 1265 (emphasis added).

First, the First Amendment clearly protects specific modes of expression, not only ideas. As this Court stated in *Cohen v. California,* "we cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process." 403 U.S. at 26. The idea/expression dichotomy cannot *by itself* play the unilaterally definitive role that the court below attributed to it.

Second, fair use provides important mitigation of the first amendment burdens imposed by the Copyright Act, but it too limits quite substantially the expressive uses that one can make of copyrighted works. It is a doctrine tailored to continue to preserve some freedom of expression for users, but is still bounded by the government's interest in providing owners incentives.

Fair use, then, is very much constrained by the need to secure incentives to authors. But after the role of copyright in providing incentives for creation has largely dissipated with the passage of time, it is not only sound policy that requires removal of all those burdens on speech

that we tolerate to secure these incentives. The First Amendment demands that individuals no longer be prohibited from expressing themselves as they will, including by using materials previously copyrighted, when doing so would no longer serve the government's stated interest. A new annotated edition of *Gone with the Wind* could play an important role in political discourse even if it took too much to enjoy the protection of fair use. Prohibiting its publication when doing so can no longer be said to contribute to the likelihood of the novel's creation cannot be squared with the First Amendment. The same can be said of a new staging of Shakespeare's *Richard III* set as a 20th century critique of fascism, or publishing Victor Hugo's discourse on insurrection from *Les Miserables*. Term limitation is the most extensive and substantive source of public domain materials available for use unburdened by solicitude to congressional copyright policy.

II. Legislation That Substantially Expands Copyright Should Be Subject To Heightened First Amendment Scrutiny

The Copyright Act is a statute that regulates speech. It tells some people that they cannot print or publicly present certain words or images. It is not a law aimed at general conduct that has incidental effects on expression — like a trespass statute or an anti-littering ordinance. It is a law aimed *solely* at expression. It is not a time, place, and manner regulation intended to effectuate non-speech-related purposes.[4] Its entire purpose and effect is to

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[4] "[I]n the context of intellectual property, [the] 'no adequate alternative avenue' test does not sufficiently accommodate the public's interest in free expression. Intellectual property, unlike real estate, includes the words, images and sounds that we use to communicate. . . . Restrictions on the words or images that may be used by a speaker,

regulate the production of information, culture, and knowledge—all aspects of society central to the ambit of the First Amendment. Its operation is by selective prohibition of printing, publishing, or public expressive performance or display. To paraphrase this Court in *Bartnicki v. Vopper*, 532 U.S. 514, 121 S. Ct. 1753 (2001), if the regulation of printing, publishing, or public performance of materials one deems interesting, evocative, or insightful is not regulation of pure speech, it is hard to imagine what would be. See *id.*, 121 S.Ct. at 1761. Such regulation requires at least intermediate scrutiny. *Id.*

Copyright has traditionally been justified in relation to the First Amendment as providing "the engine of free expression," *Harper & Row*, 471 U.S. at 558, just as the cable must-carry rules were justified as facilitating the availability of information "from diverse and antagonistic sources." *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 192 (1997) ("*Turner II*"). But just as in the *Turner* litigation the Court found it necessary to review Congress's law to see that it indeed facilitated diverse discourse, so too must courts review copyright legislation to assure that it is the engine of free expression and not the vehicle of censorship. This does not mean that every copyright suit would now include a First Amendment component. But it does mean that Congress cannot substantially shift the boundaries of copyright without being subject to heightened scrutiny. At the very least, a law prohibiting a substantial number of speech acts previously permitted under copyright law must pass the kind of scrutiny this Court applied to other laws that directly regulated speech in the name of improving the flow of information in society—like the must-carry rules.

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therefore, are quite different than restrictions on the time, place, or manner of speech." *Cardtoons, L.C. v. Major League Baseball Players Ass'n.*, 95 F.3d 959, 971 (10th Cir. 1996) (citations omitted).

Congress must, at the very least, show that the statute serves an important government interest in a manner no more restrictive than necessary. *Turner I*, 512 U.S. at 662.

Indeed, in the context of copyright, heightened scrutiny is even more important than where it has been applied most vigorously—in the area of media regulation.[5] Vigorous application of the First Amendment is particularly important where there is a substantial fear that Government will protect its own interests or those of some special, over-represented interest. Where media regulation is concerned, usually both the parties burdened and the parties benefited are well represented in the political process. The cable carriers who suffered the burden of the must-carry rules at issue in the *Turner* litigation, for example, participated in the political process that preceded enactment of the challenged statute and rules no less than did the broadcasters who benefited from them. In the context of copyright, however, the benefits and burdens of regulation are distributed in very different patterns. The *benefits* are always clearly articulated by present owners of copyrights. The *burdens* are usually carried by diffuse members of the public, including those not yet born or too young to articulate their interest in a copyright law—such as one of shorter duration—more solicitous of their freedom of expression. The CTEA is a quintessential instance of a rent-seeking statute likely to result from such an imbalance of representation, a fact that could not be more clearly evidenced than by its retroactive application, which provides a tremendous windfall precisely to those parties that lobbied Congress for its passage. Without heightened scrutiny, Congress will of necessity overreach in copyright legislation and understate the burdens it

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[5] *See, e.g., Turner II*; *Time Warner Entertainment Co. v. FCC*, 240 F.3d 1126 (D.C. Cir. 2001).

imposes on expressive freedoms. It is the role of the judiciary, removed from the humdrum of political lobbying and presented with concrete instances of the burdens the new law imposes on expression, to provide that backstop against congressional overreaching.

III. The Categorical Exclusion Is Germane To The Holding Below, And Conflicts With A Recent Decision By The Court Of Appeals For The Second Circuit

The refusal to submit the CTEA to any form of First Amendment review is germane to the decision of the Court of Appeals for the D.C. Circuit, and is in conflict with a recent decision of the Court of Appeals for the Second Circuit in *Universal City Studios v. Corely*, 2001 U.S. App. LEXIS 25330 (2d Cir. Nov. 28, 2001). The Act itself extends the term of copyright from life of the author plus fifty years, to life of the author plus seventy years, or where the copyright is initially vested in a corporation, from seventy five to ninety five years. *See* Pub. L. No. 105-298, § 102(b), 112 Stat. 2827 (1998). It does so not only prospectively, but retrospectively as well. *See Id.* § 102 (b) & (d). Had the Court of Appeals subjected this statute, in particular its retrospective application, to First Amendment review, it is highly unlikely that the Act would have been upheld in its entirety, and certainly it would not have been upheld upon such cursory review.

The justification for the Act is substantially weaker by comparison to other statutes that have been held unconstitutional, or that, though upheld, presented hard cases.[6] The Act is passed pursuant to Article I, section 8,

[6] This Court, for example, subjected the must-carry rules to substantially more searching scrutiny than the court below applied to the CTEA, even though the *prima facie* (and, as it turns out, ultimate) economic justification for the must carry rules was substantially more sound than the economic rationale of the retroactive extension of copyright. Another panel of the Court of Appeals for the D.C. Circuit, for example, recently struck down the vertical and horizontal ownership rules imposed by the Federal Communications Commission on cable operators. Those rules—though held insufficiently justified—were based on a substantially more plausible economic rationale than any justification that could be offered in support of the CTEA. *See Time Warner Entertainment Co. v. FCC*, 240 F.3d 1126 (D.C. Cir. 2001).

clause 8 of the Constitution. Its constitutionally mandated goal is therefore to "supply the economic incentive to create and disseminate ideas." *Harper & Row*, 471 U.S. 558. It is not at all clear that the *prospective* extension of the Act is justifiable as a means to support that end, because the discounted present value of any revenue stream to be captured eight decades or more hence is virtually insignificant. *See* Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281, 323-29 (1970); William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 17 J. L. STUD. 325, 361-2 (1988). All one need do to understand this is to evoke the image of a movie producer raising funds for a film by promising investors a return seventy-five or ninety-five years hence.

The *retrospective* application of this dubious extension is practically laughable as a means to supply economic incentives to authors and other creators. It is impossible to create incentives by retroactive extension of the term of protection for works already created. By definition—the works already exist—the incentive subsisting prior to the extension was sufficient to bring them into being. *See* Landes & Posner, at 362; Melville B. Nimmer, *Does Copyright Abridge the First Amendment*

Guarantees of Free Speech and Press?, 17 UCLA L. REV. 1180, 1194-95 (1970).

Perhaps there are other good reasons to support this retroactive extension, such as "harmonization" with other countries, or preservation of old works, or some non-laughable argument that the retroactive extension does in some fashion support creativity. It is unnecessary for this Court to prejudge the weight and sufficiency of such hypothetical reasons, because the court below never properly considered them. It is not, in any event, this Court's practice "to create hypothetical nonobvious explanations in order to justify laws that impose significant restrictions upon speech." *Denver Area Educ. Telecomms. Consort. v. FCC*, 518 U.S. 727, 760 (1996). Instead, all the Court need do is remand the case for consideration in light of the appropriate First Amendment standard.

Stating the correct standard is particularly important in order to resolve a conflict among the circuits. In *Corely*, the Court of Appeals for the Second Circuit recently reviewed Section 1201(a)(2) of the Copyright Act, 17 U.S.C. § 1201(a)(2) against a first amendment challenge. While the Second Circuit upheld that section of the Copyright Act, it did so only after clearly and explicitly subjecting that provision to heightened first amendment scrutiny following the *Turner* standard. 2001 U.S. App. LEXIS 25330, at *62-63.

CONCLUSION

For the foregoing reasons, *amici* urge the Court to reverse the judgment below and remand for reconsideration in light of the appropriate First Amendment standard of review.

Respectfully submitted,

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